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IN THE

Supreme Court of the United States

OCTOBER TERM—1949

Nos. 439 and 440

WILLIAM HEYMAN and LYDIA VOGEL HEYMAN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

LYDIA VOGEL HEYMAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION

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Supreme Court of the United States

OCTOBER TERM—1949.

Nos. ..... and .....

WILLIAM HEYMAN and LYDIA VOGEL HEYMAN,
Petitioners and Appellants below,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee below.

LYDIA VOGEL HEYMAN,
Petitioner and Appellant below,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee below.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

To THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully show that:

Summary Statement of Matter Involved.

This case was initiated by two petitions in the Tax Court of the United States offered by your petitioners herein for a redetermination of deficiencies in income tax claimed by the Commissioner of Internal Revenue for the

calendar years 1938 and 1939 (R., 9, 22). After a trial in the Tax Court, decisions were rendered in favor of the respondent, Commissioner of Internal Revenue, and against your petitioners, determining that there was a deficiency in income tax of $48.00 and a fraud penalty of $24.00 for the calendar year 1938 (R., 255) and a deficiency in income tax of $68,255.47 and a fraud penalty of $38,497.44 for the calendar year 1939 (R., 256). Both decisions were entered on September 8, 1947. Petitions for Review of said decisions were filed by petitioners with the Court of Appeals for the Second Circuit (R., 257, 265) which affirmed the decision of the Tax Court.

The principal questions involved on said appeal were in connection with the 1935 assignment by Mideastern Contracting Corporation to its stockholders (including petitioner, Lydia Vogel Heyman) of its claim against the City of New York and her assignment of portions of said claim to her husband (petitioner William Heyman) and her son.

Jurisdictional Statement.

It is contended that the Supreme Court has jurisdiction to review the judgment of the Court below under the provisions of United States Code, Title 28, Section 1254, judgment by the Court of Appeals for the Second Circuit having been rendered on August 2, 1949, and this petition for a writ of certiorari having been filed on or before October 31, 1949.

Questions Presented.

The questions herein presented are (1) whether the proceeds of the assigned claim should be taxed to the ultimate assignees or to the assignor, (2) alternatively, whether such proceeds constitute long-term capital gain as a distribution "in complete liquidation" under Section 115(c) of the Revenue Act of 1938, and (3) whether the fraud penalty herein should be sustained.

Reasons Relied on for the Allowance of the Writ.

1. With regard to the first question presented, petitioners maintain that the Court of Appeals for the Second Circuit has rendered a decision in conflict with the decision of the Supreme Court of the United States in *Blair* v. *Commissioner,* 300 U. S. 5 (1937), and in conflict with the decision of the Court of Appeals for the Ninth Circuit in *U. S.* v. *Spalding,* 97 F. (2d) 701 (C. A. 9th, 1938) cert. den. 305 U. S. 644 (1938), and in conflict with the decision of the Court of Appeals for the Eighth Circuit in *Iowa Bridge Company* v. *Commissioner,* 39 F. (2d) 777 (C. A. 8th, 1930).

2. With regard to the second question presented, petitioners maintain that the Court of Appeals for the Second Circuit has rendered a decision in conflict with the decision of the Supreme Court of the United States in *Burnet* v. *Logan,* 283 U. S. 404 (1931).

3. With regard to the third question presented, petitioners maintain that the Court of Appeals for the Second Circuit has rendered a decision in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Duffin* v. *Lucas,* 55 F. (2d) 786 (C. A. 6th, 1932), and in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Jemison* v. *Commissioner,* 45 F. (2d) 4 (C. A. 5th, 1930).

WHEREFORE, your petitioners pray that writs of certiorari issue under the seal of this Court directed to the Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in the cases numbered and entitled on its docket Nos. 88 and 89 (October Term, 1948)

William Heyman and Lydia Vogel Heyman, Petitioners, v. *Commissioner of Internal Revenue, Respondent, Lydia Vogel Heyman, Petitioner* v. *Commissioner of Internal Revenue, Respondent,* to the end that these cases may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgments herein of said Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1949.

Nos. ..... and .....

WILLIAM HEYMAN and LYDIA VOGEL HEYMAN,
Petitioners and Appellants below,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee below.

LYDIA VOGEL HEYMAN,
Petitioner and Appellant below,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

Opinion of Court Below.

The opinion in the Court of Appeals for the Second Circuit is reported in 176 F. (2d) 389 (1949).

Jurisdiction.

1. The date of the judgments to be reviewed is August 2, 1949.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is U. S. Code Title 28, Section 1254. The judgments referred to above are final judgments affirming the decisions of the Tax Court.

Statement of the Case.

This has already been stated in the preceding petition (pages 1 and 2) which is hereby adopted and made a part of this brief.

Specification of Errors.

1. The Court of Appeals erred in holding that the proceeds of the claim against the City of New York were not taxable to the ultimate assignees.

2. The Court of Appeals erred in holding that the proceeds of the claim did not constitute long-term capital gain as a distribution in complete liquidation under the applicable provision of the Internal Revenue Code.

3. The Court of Appeals erred in holding that the fraud penalty should be sustained.

ARGUMENT

Summary of Argument.

POINT A: The determination of the Court of Appeals that the proceeds of the claim against the City of New York were not taxable to the ultimate assignees is in conflict with a decision of the Supreme Court of the United States and with decisions in other Circuits.

POINT B: The determination of the Court of Appeals that the proceeds of the claim did not constitute long-term capital gain as a distribution in complete liquidation under the applicable provision of the Internal Revenue Code is in conflict with a decision of the Supreme Court of the United States.

POINT C: The affirmance by the Court of Appeals of the fraud penalty is in conflict with decisions in other Circuits.

POINT A.

The determination of the Court of Appeals that the proceeds of the claim against the City of New York were not taxable to the ultimate assignees is in conflict with a decision of the Supreme Court of the United States and with decisions in other Circuits.

The failure of the Court of Appeals for the Second Circuit to follow the rule laid down in *Blair* v. *Commissioner*, 300 U. S. 5 (1937) to the effect that an assignment of beneficial interests is not merely an assignment of future income is urged as a reason for certiorari. The decision herein is also in conflict with a decision of the Court of Appeals for the Ninth Circuit in *U. S.* v. *Spalding*, 97 F. (2d) 701 (C. A. 9th, 1938) cert. den. 305 U. S. 644 (1938), involving an assignment of an oil royalty interest, and is also in conflict with the decision of the Court of Appeals for the Eighth Circuit in *Iowa Bridge Company* v. *Commissioner*, 39 F. (2d) 777 (C. A. 8th, 1930) involving the assignment of a contract for building bridges.

POINT B.

The determination of the Court of Appeals that the proceeds of the claim did not constitute long-term capital gain as a distribution in complete liquidation under the applicable provision of the Internal Revenue Code is in conflict with a decision of the Supreme Court of the United States.

It is contended that the decision of the Court of Appeals herein conflicts with the decision of the Supreme Court of the United States in *Burnet* v. *Logan*, 283 U. S. 404 (1931). If the assignment in the instant case was invalid, there was a complete liquidation in 1937, and future payments on the

claim so distributed in liquidation should, in accordance with the *Logan* case, *supra,* become taxable to the distributees as long-term capital gain under the provisions of Section 115(c) of the Revenue Act of 1938.

POINT C.

The affirmance by the Court of Appeals of the fraud penalty is in conflict with decisions in other Circuits.

The Court of Appeals affirmed the imposition of a fraud penalty of the Tax Court. Petitioners maintain that this decision is in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Duffin* v. *Lucas,* 55 F. (2d) 786 (C. A. 6th, 1932), wherein it was held that there could be no fraud in failing to determine a doubtful legal question against oneself. Certainly, the interpretation of the complicated instruments herein constituted a doubtful legal question. At no point in the stream of facts was there any evidence of concealment, nor does the Respondent maintain to the contrary. *Jemison* v. *Commissioner,* 45 F. (2d) 4 (C. A. 5th 1930).

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting writs of certiorari and thereafter reviewing and reversing said decisions.

Dated: October 26, 1949.

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